

The Commission has thoroughly rejected these same arguments in New England and should do so again. In New England, the DPUC presented an argument that was virtually the same as MnDOT's, that its action was defensible as a "reasonable exercise of its explicitly reserved authority." At ¶ 21. The Commission rejected that position saying:

[A]ccepting the DPUC's claim would, in effect, require us to employ a relaxed interpretation of the term "necessary" that is inconsistent with Congress's purpose . . .

At ¶ 21. The Commission noted further:

We do not believe that Congress intended that the term "necessary" be interpreted here in a manner that could enable the exception contained in subsection 252(b) to swallow the general rule prohibiting barriers to entry in subsection 253(a).

At ¶ 25. The State's position, that the Commission should defer to any reasonable exercise of judgement, should be rejected for the same reason. Further, it is clear that there are other methods of controlling right-of way use that do not damage competition and that would achieve public safety and all other valid purposes of Section 253(b).

C. Exclusive Freeway Use Provision Is Not Necessary To Preserve Public Safety.

The State relies entirely on the opinion of the engineer in charge of this project to support its assertions that "the alternative to single-party exclusive access is no access at all" and that "MnDOT has determined that protection of public safety requires exclusive longitudinal access with a single point of control and contact." (St. Pet. pp. 8-9, 27.) In this way, the State attempts to create the most difficult choice for the Commission of either allowing discriminatory use of the freeway right-of-way or precluding any use of that resource. However, it is far from clear

these rights-of way, is necessary to protect public safety and convenience. ... This right-of-way management decision rests solely within the discretion of the state. (Emphasis added). At 30.

that such an alternative would provide a justification for discrimination.⁶³ Further, it is clear from the following facts that public safety does not require that access along the freeways be limited to a single fiber optic facility provider.

First, although the former regulations of the Federal Highway Administration (“FHWA”) severely limited longitudinal access to the interstate freeway rights-of-way and the FHWA controlled the grant of such access, these regulations were amended in 1988 to allow states to determine on their own whether to allow such use.⁶⁴ Significantly, there is no FHWA requirement that such longitudinal use be limited to an exclusive provider. Further, FHWA has approved a number of policies from individual states that do not require exclusive use. Unless it is believed that the FHWA has abdicated its longstanding concerns regarding public safety, the absence of any requirement that states grant only exclusive use and approval of state policies that do not require exclusive use show that the FHWA does not believe that exclusive freeway use is needed for the public safety.

Second, the guidelines of the American Association of State Highways and Transportation and Administrators (“AASHTO”), also do not require exclusive use. AASHTO

⁶³ In Huntington Park the Commission quoted its Pay Telephone Reconsideration Order, saying in part: We emphasize that any state regulations must treat all competitors in a nondiscriminatory and equal manner . . . Thus, a state can identify, for public safety reasons, areas where no competitor can place a payphone; but it cannot draw distinctions that allow some class of competitors to enter the payphone market and not others. (Emphasis added). At. ¶ 12.

⁶⁴ § 1.1.2 of the 1996 FHWA Guideline (Exhibit 2) states in part: [O]n February 2, 1988, USDOT published a new policy in which states would have the power to approve the installation of fiber-optic cables and other utility lines along interstate highway rights of way. . . . Prior to its policy revision in February 1988, FHWA approved requests for cable laying on a case-by-case basis. . . . The USDOT policy change requires states to file a plan with FHWA describing policies on utility installation. If a state chooses to allow utilities along interstates, it must ensure that safety is not affected.

has provided authoritative guidance regarding highway safety issues for many years. Its standards have been incorporated by reference into many state regulations and into the FHWA regulations as well. In 1995, AASHTO adopted a new policy regarding use of freeways by fiber optic providers which reads in part as follows:

WHEREAS, buried fiber optic cable can be installed with minimal disturbance of existing traffic, require infrequent access for maintenance purpose, can usually be sited to even further minimize disruption or hazard to vehicular freeway users, and in other ways can be distinguished from other types of utilities such as pipelines and electrical transmission facilities; ...

NOW, THEREFORE, BE IT RESOLVED that the AASHTO Board of Directors acknowledges the distinction between buried fiber optic cables and other types of utilities, wherein it is deemed permissible to permit longitudinal use of freeway rights-of-way for the former under appropriate guidelines while retaining existing policy in opposition to the longitudinal use of freeway rights-of-way for other utility types; ...

See Exhibit 5, Appendix A. This recent AASHTO policy expressly recognizes that fiber optic facilities pose much less risk than other utilities, does not impose any requirement of fiber optic exclusivity, and preserves the policy opposed to use by other utilities. This policy contradicts the assertion by the MnDOT engineer that exclusive fiber use is essential for public safety and casts further doubt on the consistency of the State's overall position, in light of the State's reservation of the right to allow use by other non-competing, albeit more dangerous utilities.

Third, the approach taken by several other states shows that exclusive use is not needed to protect public safety. Summarizing the responses of 34 states to a 1992 Washington State Feasibility Study, § 3.2.1 of the 1996 FHWA Guideline reads:

The study concluded that states have varying policies and summarized those policies (in order of increasing restriction) as follows:

- Only one state, Kansas, allowed all utilities on freeways and limited access highways; six states permitted communication networks (only) in the freeway right-of-way; 18 states based their policies on a 1982 or 1989 AASHTO

guideline for accommodation in the freeway right-of-way; 10 states permitted no utilities on freeways.

- Iowa and Georgia were the only states that charge for longitudinal use of their right-of-way. Minnesota was planning to charge for use of its freeway right-of-way once current laws changed.

The Ohio Turnpike Commission has granted several non-exclusive license agreements for longitudinal installations.⁶⁵ The Iowa Department of Transportation regulates uses of the underground utility facilities, controlling location and depth of facilities, maintenance and other matters.⁶⁶ The Commission has recognized that the establishment of appropriate guidelines is a preferable approach to both service quality and safety concerns. In Classic the Commission stated:

Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in Section 253(b) through means other than absolute prohibitions on entry, such as clearly defined service quality requirements or legitimate enforcement actions.

11 FCC Rcd at 13102, ¶ 38. Other states have also adopted policies that assure public safety by imposing appropriate criteria, rather than arbitrarily limiting access to a single fiber optic provider.⁶⁷

Fourth, the published regulations of the Minnesota Department of Transportation do not require exclusive use, but rather impose stringent standards equally applicable to all.⁶⁸ The

⁶⁵ See, § 2.2 of 1996 FHWA Guideline.

⁶⁶ See, Exhibit 6 attached, Iowa, DOT § 115.24 Longitudinal utility facility occupancy of freeways, subparts 1-20.

⁶⁷ See, e.g. Illinois Highway Code, 605 ILCS 5/9-113(c); 43 Texas Administrative Code § 21.37.

⁶⁸ Minn. Rule 8810.3300 reads in part:

Utilities along the interstate highways shall be located outside the control-of-access lines except as outlined below. ... There may be extreme cases, where, under strictly controlled conditions, a utility may be permitted inside the control-of-access lines along an interstate highway. In each case there must be a showing that any other utility location is extremely difficult and unreasonably costly to the utility consumer, that the installation on the right-of-way of the interstate highway

MnDOT Policy Guideline, dated July 27, 1990 (implemented in response to the FHWA revisions in 1988) similarly does not contemplate, much less require, exclusivity but establishes objective criteria. These criteria include 16 conditions applicable to all installations, the possibility that multi-duct systems may be required, set annual fees, bonding and insurance requirements.⁶⁹

Fifth, the prior experience of Minnesota regarding use of the freeway corridor between Minneapolis and St. Cloud,⁷⁰ also demonstrates that exclusive use is not needed. The State is allowing the installation of an additional system by the Company over the already used portions of Interstates 494 and 94.

Finally, even the Agreement acknowledges that considerations of safety do not compel only a single fiber optic user⁷¹ and reserves the right to grant non-competing utilities the right to use the freeway rights-of way for their facilities.⁷² Since such utilities would be among the far

will not adversely affect the design, construction, stability, traffic safety, or operation of the interstate highway and that the utility can be serviced without access from through traffic roadbeds, loops, or ramps.

⁶⁹ See, Exhibit 7 attached, Mn/DOT Policy Guideline, July 27, 1990. (There has been no indication that MnDOT has the authority under Minnesota law to preclude other entities from applying under this Policy Guideline.)

⁷⁰ See, Minn. Laws 1990, which enabled AT&T to install a fiber optic duct system between Plymouth, Minnesota (a Minneapolis suburb) and St. Cloud, Minnesota, utilizing some of the most heavily traveled portions of Interstate 494 and Interstate 94.

⁷¹ Agreement, **Section 1.9** reads in part:

Based on its experience under the Special Statute [authorizing the installation by AT&T] and the experiences of other state departments of transportation, the State finds that under strictly controlled procedures the grant of access permits for a single or very limited number of installations of fiber optic cable and related facilities within the control of access lines of freeway throughout the State can be accomplished consistent with public health, safety, and welfare, but that grant of such permits to multiple parties will create undue risk to public safety and welfare, undue cost of monitoring, administration and maintenance to the State, undue risk of interference with the free flow of traffic, and undue delays and increases in costs to State to widen, relocate or otherwise alter or improve freeways. (Emphasis added.)

⁷² Agreement, **Section 3.1** Grant of Rights to Develop Network; Term.

more hazardous utilities which remain outside of the 1995 AASHTO Policy, it is impossible to conclude that safety considerations are responsible for the distinction.

The combination of all of these facts conclusively refute the assertions of the of the MnDOT engineer which provide the sole basis for the State's position that safety considerations require the State to limit access to a single fiber optic provider.

D. Exclusive Freeway Use Is Not Necessary To Establish An ITS.

The State cites the administrative advantages of establishing an Intelligent Transportation System ("ITS or "smart highway"). (St. Pet. pp 2, 9.) However, there is no indication or showing that the State cannot successfully implement a State network, including an ITS, without such severe restrictions on use by other fiber optic providers. To the contrary, it is generally recognized that there are several ways in which ITS can be implemented.⁷³

AASHTO Guidelines clearly demonstrate the range of alternatives that are available for implementation of shared resource projects, including ITS. The AASHTO Guideline reads in part:

CONCLUSIONS

Shared resource projects offer a new opportunity for public-private partnering for transportation agencies and are particularly relevant to ITS projects. Although a

(b) The exercise of Company's and S&W's right granted in subsection (a) ...is limited and conditioned by, among other provisions set forth in this Agreement, the following:

(iii) the paramount right of MnDOT to possess, control and utilize Right of Way as permitted by Laws and Regulations, including but not limited to the right to grant Permits to others pursuant to the Utility Accommodation Policy, with the benefit, however, of Sections 11.1 and 14.1 (c) and the provisions on relocation set forth in Section 11.2:

⁷³ See, Exhibit 2, 1996 FHWA Guideline:

Although such systems [ITS] can be leased from private telecommunications providers or installed, owned and operated entirely within the public sector, shared resource projects may offer the public sector a way to implement ITS (wireline and wireless) with a lower financial burden.)

Section 1.1.1.

number of issues must be addressed, there are options for each so that individual projects can be structured to suit particular circumstances. ...

Compensation options include barter and cash. In barter or in-kind arrangements, private parties install the system, receiving access to the right-of-way for their own capacity in return for providing telecommunications capacity telecommunications services to the public agency. ...

Of course it is possible for a public agency to allow private access to highway right-of-way without direct compensation of any kind, simply for the benefit to the community if having telecommunications infrastructure located in the highway, where it is most advantageous to development of ITS services or their communications needs.

Exhibit 5 attached, at § 1.1.1. Exclusivity was only one of the methods to address the “barter” form of compensation. The FHWA Guideline reads in further part:

Shared resource agreements may (1) limit longitudinal access to public right-of-way to a single private sector provider (that is, grant exclusivity), (2) require access for all interested firms that meet specified qualifications (e.g., fiber-optics installations), or (3) prescribe a structure between these two ends of the range. ...

In making this determination, the public agency must balance certain competing considerations. On one hand, by granting only exclusive rights, the public agency will limit the number of third parties that will have access to the right-of-way at any given time, thereby promoting the agency’s objectives in maintaining the safety and integrity of the highway. Further, by granting exclusive rights, the public agency may increase the perceived value of access rights offered to the potential telecommunications partner. ...

On the other hand, granting exclusive rights may foster anti-competitive effects. ...

Exhibit 2 attached, at § 5.1. In addition, other States have implemented State Networks and are implementing ITS without granting exclusive use of the freeway rights of way.⁷⁴ The State has

⁷⁴ See, Report to the State of Vermont. 13. Appendix C: Selected Research.

www.leg.state.vt.us/reports/govnet/govnet13.htm

North Carolina Information Highway (NCIH) will link more than 3,400 sites -- public schools, hospitals, libraries, community colleges, universities, law enforcement centers, courthouses, prisons, and local and State government locations -- in all 10 counties of the State. Southern Bell,

failed to show that its record keeping, engineering and managerial resources are incapable of dealing with more than one provider of fiber optic facilities. It is clear that the presence of multiple fiber optic facilities would not prevent MnDOT from operating an ITS.

While no physical asset can accommodate infinite usage, there is no basis to conclude that Minnesota freeway rights-of-way are incapable of accommodating use by more than one fiber optic provider. Accordingly, the Exclusive Freeway Use Provision provisions of the Agreement also fails to meet the criteria that the restriction be “necessary.”

E. The Exclusive Freeway Use Provision Is Not Competitively Neutral.

Even if Exclusive Freeway Use Provision was “necessary” within the scope of Sections 253(b), the limitation must also be “competitively neutral.” In preempting a state build-out requirement because of its prohibitive effect on telecommunication service providers, the Commission explained:

The Texas commission’s assertion that these [build-out] requirements advance the public interest goals enumerated in section 253(b) ignores the statutory mandate that the means chosen to further those goals must be competitively neutral.

(Emphasis added.) PUC of Texas At ¶82. The Commission also found that enforcement of Texas’ continuous property restrictions relating to the build-out requirements could not be

Carolina Telephone, GTE South, and the 24 other local telephone companies who are building the network will own and operate it as they have with the State’s public switched network. See also, Exhibit 8, attached, Kansas Department of Transportation Solicitation for Fiber Optic Infrastructure System Project Number 106 K-6454-01, October 30, 1997.

KDOT is offering the use of its right-of-way in the KCMA [Kansas City Metropolitan Area] area to interested companies with the intention of allowing these companies to install and operate communications networks along the right-of-way in exchange for dedicated information-carrying capacity within the fiber optic infrastructure network for KDOT’s ITS use ... It is not KDOT’s intention to pay for the installation or provision of services and fiber optic structure defined herein, except as noted herein. At p 1.

Appendix A clearly indicates that use of the Interstate Highways is included in the project.

preserved under section 253(b) because enforcement of these restrictions would not be “competitively neutral.”

Limiting resale of SWBT Centrex service to a continuous property area has a disparate impact on the ability of new entrants to compete in the provision of Centrex services Consequently, we find that enforcement of the continuous property restriction is not “competitively neutral” and thus not permissible under section 253(b).

(Emphasis added.) Id. at ¶221. The Exclusive Freeway Use Provision is fundamentally unequal and, will obviously have a “disparate impact” on the ability of other entities to compete. The express purpose and effect of the Exclusive Freeway is to foreclose all other service providers from using of the freeway right-of-way. By imposing this obvious competitive advantage on the Company and barrier on other entities, the Exclusive Freeway Use Provision violates the requirement of competitive neutrality

E. The Use Of A Bidding Process To Grant Unnecessarily Exclusive Access To Right of Way Does Not Satisfy the Requirements of Section 253(b).

The state claims (St. Pet. p. 31) that its use of an allegedly open bidding process is competitively neutral in the same way that an FCC spectrum auction “allocated limited capacity fairly among competitors, while allowing for development of the resource.” This analogy is invalid for several reasons, the most prominent of which is that spectrum licenses and access to freeway rights-of way are not comparably limited resources.

Spectrum licenses are acknowledged to be limited by the problem of interference between two or more transmitters on the same frequency in the same area. Despite the State’s claims, freeway right-of way is not so limited. As discussed above, even if there is a finite limit to the number of separate cable which can be laid in the right-of way, and a clear safety need to control the construction and maintenance traffic, the State has not established these considerations

justify its prohibition on competition. The real world answer is not none or one, it is some number more than one despite the conclusory testimony of the state employee who conceived the plan (Lari Affidavit, Exhibit 6 to State Petition).

In any event, spectrum auctions conducted under the authority of Section 309(j) are not subject to the Section 253 “neutrality” requirements. The later, but not the former, were adopted in the context that expected multiple users of rights-of way, conduit space, etc. As part of the 1996 Act, the Section 253 discussion of rights-of way should be considered as working in parallel with Section 251(b)(4) which requires local exchange carriers to make rights-of way available to competing providers. Given the assumptions of that section and Section 224(a)(4) that multiple users are possible in rights-of way, it is unreasonable to believe Congress considered that states could prohibit such use, much less claim that an exclusive grant to one competitor was “competitively neutral.”

IV. THE EXCLUSIVE FREEWAY USE IS INCONSISTENT WITH THE STATE’S AUTHORITY TO MANAGE THE RIGHT OF WAY UNDER SECTION 253(c).

Section 253(c) preserves the traditional authority of the state and local government to manage the public rights-of-way, reading in part:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis . . .

(Emphasis added.) However, the Exclusive Freeway Use Provision is inconsistent with these provisions because it constitutes neither bona fide right-of way management nor is it competitively neutral and nondiscriminatory.

A. The Exclusive Freeway Use Provision Is Beyond The Scope Of Right Of Way Management.

The essence of the Exclusive Freeway Use Provision provisions of the Agreement is the provision of free fiber optic capacity to the State in return for an exclusive right to use the right-of-way, a bartering by the State of market power over third parties in return for cost savings for itself. The State purports to control the Company's use of market power by requiring that wholesale transport services be provided at non-discriminatory rates. Neither bargaining Exclusive Freeway Use Provision for free capacity nor regulation of rates and capacity are within the scope of right-of way management under Section 253(c). The Commission has stated:

We recognize that § 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform a range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. . . . These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

Troy ¶103. The right-of way management functions described in Troy are consistent with earlier statements by the Commission.⁷⁵ Based on these standards, the Exclusive Freeway Use Provision provisions of the Agreement cannot be justified as right-of-way management.

B. The Exclusive Freeway Use Provision Also Fails The Requirement That A Legal Requirement Be Competitively Neutral And Nondiscriminatory.

The State argues that the combination of the RFP process and the terms of the Agreement requiring the Company to charge nondiscriminatory rates satisfy the requirement that the

⁷⁵ Classic, 11 FCC Rcd. 13082.

compensation paid for using the right-of way be competitively neutral and non-discriminatory. (St. Pet pp 29-31). There are severe flaws in this argument.

First, this argument confuses the proper role of the State and telecommunications service providers. Section 253(c) does not empower the State to delegate its right to receive “reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis” to a single telecommunications provider (who would then receive compensation from other providers.) There is no indication in Section 253(c) that a State is authorized to nominate one competitor as its surrogate to collect compensation from other competitors.

Second, there is no indication that the use of an RFP process meets the requirements of competitive neutrality under Section 253(c). If that sort of arrangement meets the requirements of Section 253(c), then a city (e.g. Bogue or Hill City) could use an RFP process to grant exclusive use of public streets to a single entity, subject only to the requirement that the entity lease capacity to LECs and CLECs at nondiscriminatory rates. If that were a legitimate use of Section 253(c), there would be little left of Section 253(a).

Clearly, such an arrangement can not stand under Section 253. Just as clearly, the State can not grant an exclusive right to use the freeway rights-of way and delegate the right to receive reasonable compensation to one of many competitors for wholesale capacity.

V. THE REQUEST FOR DECLARATORY RULING SHOULD BE DENIED AND THE EXCLUSIVE FREEWAY USE SHOULD BE PREEMPTED.

The State’s Request for a Declaratory Ruling could be granted only if the Commission could determine that the Exclusive Freeway Use Provision could not, as a matter of law, be found to violate Section 253(a) with respect to any entity or for any service during the 10 to 20+

year period of its operation. Such a finding cannot be supported on the facts before the Commission. To the contrary, the facts before the Commission demonstrate a current violation of Section 253(a) that is not justified under either Section 253(b) or (c). Accordingly, the Commission should preempt the Exclusive Freeway Use Provision under Section 253(d).

A. The request for Declaratory Ruling should be denied because both current and future violations of Section 253(a) will result from the Exclusive Freeway Use.

As set forth above, the Exclusive Freeway Use Provision violates Section 253(a) by establishing a requirement that has the effect of prohibiting the ability of many entities to provide interstate and intrastate services. The exclusion of other entities imposes significant burdens on those entities that are not imposed on the Company, impeding their choice of facilities and resulting regulatory treatment that is not fair or equal. The violation of Section 253(a) cannot be justified under Section 253(b) because there are other less restrictive ways of achieving public safety and meeting other concerns. Further the Exclusive Freeway Use Provision does not meet the requirement of competitive neutrality. Finally, the Exclusive Freeway Use Provision cannot be justified under Section 253(c) because it is not right-of way management and because it fails to meet the requirements of competitive neutrality and nondiscrimination. Accordingly, the request for Declaratory ruling must be denied.

B. The Exclusive Use Should Be Preempted Under Section 253(d).

Section 253(d) reads in part:

If . . . the [Commission] determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the [Commission] shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(Emphasis added.) Section 253(d) imposes on the Commission a non-discretionary duty to preempt local laws, regulations or legal requirements that have the prohibitive effects prescribed by § 253(a). As the Commission has noted:

“[S]ection 253 expressly empowers -- indeed, obligates -- the commission to remove any state or local legal mandate that ‘prohibit[s] or has the effect of prohibiting’ a firm from providing any interstate or intrastate telecommunication service.” PUC of Texas ¶22.

Section 253(d) directs the Commission to limit the scope of its preemption to that which is “necessary to correct such violation or inconsistency.” While the balance of the Agreement may stand, the Exclusive Freeway Use Provision granted to the Company must be preempted under this standard.

VI. CONCLUSION:

The State of Minnesota has come before the Commission with a plan designed to leverage its monopoly power as the sole owner of clear, direct right-of way between major markets into a competitive advantage in telecommunications for its chosen supplier, with a portion of the monopoly profit being directed to itself. The Exclusive Freeway Use Provision is a “legal requirement” that will prohibit, or have the effect of prohibiting all but one telecommunications service provider from using the freeway right-of-way.

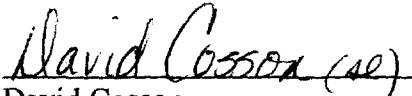
The Exclusive Freeway Use Provision will provide a competitive advantage to the Company and a competitive barrier to other entities that may seek to compete with the Company. As a result, the Exclusive Freeway Use Provision provisions of the Agreement will violate § 253(a).

The Exclusive Freeway Use Provision provisions of the Agreement does not satisfy the stringent criteria under § 253(b) or (c). Accordingly, the request for Declaratory Ruling should be denied and the Exclusive Freeway Use Provision should be preempted under Section 253(d).

Dated: March 9, 1998.

Respectfully submitted,

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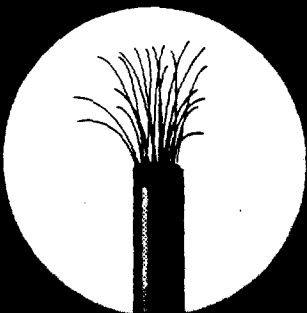

Richard J. Johnson

EXHIBIT 1

Communications Infrastructure



TRANS MART
Building Partnerships for Better Transportation



Request for Proposal

February 20, 1996

REQUEST FOR PROPOSAL FOR PUBLIC-PRIVATE PARTNERSHIP IN THE DEVELOPMENT OF COMMUNICATIONS INFRASTRUCTURE

This request does not obligate the State of Minnesota Department of Transportation to complete the work contemplated in this notice, and the department reserves the right to cancel this solicitation at any time prior to execution and approval of a contract. All expenses incurred in responding to this notice shall be borne by the responder.

Minnesota Department of Transportation

The Minnesota Department of Transportation (Mn/DOT) through its public-private initiative program (TRANS^{SMART}) requests proposals from communications firms interested in partnering with the State of Minnesota.

Goal

Mn/DOT wants to develop a public-private partnership venture with communications infrastructure providers and operators to exclusively enter, install and develop communications primarily within state freeway right of way, in exchange for providing operational communications capacity to the state.

Objectives

- a) Construct and maintain a communication network for as much of the area of the state as possible.
- b) Provide Mn/DOT with communications capacity for the future.
- c) Provide communications access to other government entity locations throughout the state.
- d) Provide the successful bidder exclusive rights to Mn/DOT freeway right of way for commercial communication infrastructure purposes.

1. Overview

Mn/DOT recognizes that fiber optics and wireless transmission are alternatives that may meet various public network needs. Proposals which include either or both alternatives will be considered. Bidders must propose statewide access. Proposals for only one region or corridor in the state will not be considered.

Mn/DOT has not thoroughly explored the state's total communication needs. However, Mn/DOT is receptive to diverse communications technology proposals. Mn/DOT wishes to barter exclusive rights to freeway right of way in exchange for capacity to satisfy immediate and future state needs. In addition, private commercial use of some data collected on the state's roadway system may be considered.

February 20, 1996

Mn/DOT is soliciting proposals from the private sector to install and maintain a communication system network throughout the state. Mn/DOT will make available, by permit, its 1,000 mile freeway and as much of its 12,000 mile trunk highway right of way as it can for either linear or spot location use by the private sector. Freeways are state trunk highways that have controlled access (access is only via grade separated in interchanges). Mn/DOT freeways are shown on Attachments A and B. Freeway rights of way use for utilities has been restrictive in the past. Mn/DOT is now permitting exclusive access to its right of way as the incentive to private industry. However, in order to facilitate private industry addressing the needs listed below, Mn/DOT will attempt to make the trunk highway right of way available by permit. The trunk highway right of way may already contain various communications and utilities service, as it is not exclusively reserved. Some trunk highway right of way may also pose some ownership challenges.

Mn/DOT wishes to receive communications services in as much of the state as possible. The goal is to provide all geographical areas of the state with fiber optics access to maintain economic vitality and to promote telecommunications throughout the state. The following is a list of other service area objectives (not prioritized). Proposers should consider providing as many of these service objectives as possible.

- **Intelligent Transportation System (ITS) use statewide**
Although Mn/DOT's ITS architecture has not yet been developed, the proposed national architecture concept is now available. Mn/DOT plans to complete a portion of its ITS architecture yet this year.
- **Fiber optic service to Mn/DOT District offices**
Mn/DOT District offices shown on Attachment C need fiber optic service.

It is understood that private proposers may provide only some of the expressed needs. Much of the selection criteria will be based on the number of statewide needs that may be met and on the quality and capacity provided.

In turn Mn/DOT is willing to consider providing:

- **Long-term access to certain Mn/DOT right of way, including the exclusive access, for communications infrastructure purposes, to the 1,000 miles of freeway, both linear and spot location throughout the state.**
- **Possible access and use of transportation data collected via existing and future communications infrastructure.**

Mn/DOT's Traffic Management Center (TMC) already operates an extensive fiber optics system in the metro area. Mn/DOT will also consider cost effective proposals that include the continued planned installation, use, management and/or the maintenance of Mn/DOT's traffic management communications system. Attachments D and E show existing and planned TMC fiber optics.

Proposers interested in including a metro traffic management fiber element should be advised that Mn/DOT will not compromise the integrity of its operations. Interested proposers should outline a service framework that would address system integrity concerns, including maintenance/response time and safety precautions that will avoid causing accidents.

Interested proposers could also gain access to and use of traffic data being collected. Mn/DOT's goal is to continue to provide traffic data to the public in a timely manner in order to improve traffic management.

Proposals will also be considered that include the use of rail corridor right of way Mn/DOT owns. These corridors are abandoned rail lines that are now part of the State Rail Bank Program. Interested responders should submit inquiries to the person identified in Section 7. These rail corridors are shown in Attachment F.

2. Guidelines for Fiber Optics

Mn/DOT will consider providing exclusive use of its freeway right of way to the successful proposer. No other private use fiber optic lines will be permitted on the freeways other than the system that now exists along I-94 between St. Cloud and Maple Grove. Responders may propose as a single or joint venture (with one entity as the prime proposer).

The successful proposer will be allowed to install fiber optic cable at a minimum depth of 36 inches (must be in conduit in the metro area). Fiber optic cable will be buried generally along the outer edges of Mn/DOT rights of way. Distribution nodes and their associated power needs will be allowed only at interchanges or crossroads where a service vehicle will be off of the roadway. Boring will be required under roadways and ramps in conduit. Crossing of the freeway will be only at existing structures. The location of all facilities on Mn/DOT right of way is to be approved by Mn/DOT and the Federal Highway Administration where appropriate. All work will be accomplished within Mn/DOT permit policies and regulations.

Except as noted below, fiber relocated due to construction, accidents, etc. will be the responsibility of the proposer. Mn/DOT will make available, on or about August, 1996, its State Transportation Improvement Program (STIP) for fiscal years 1997-1999. Any Mn/DOT construction projects during this time period covered by the STIP that require fiber relocation and

February 20, 1996

are not in the aforementioned STIP will be the financial responsibility of Mn/DOT. Fiber relocation required to accommodate projects in the STIP will be the financial responsibility of the proposer. After 1999, relocation for all projects will be the responsibility of the proposer in all cases.

The proposal should clearly define what the proposer is willing to provide to Mn/DOT as well as for statewide public access. Mn/DOT's use of fiber optics is primarily for basic voice, data, video, video conferencing, ITS and CCTV. Mn/DOT has need of an unspecified size bundle of strands of fiber in a separate conduit or in a separate fiber cable on each freeway which the proposer intends to lay fiber. Mn/DOT would like to have some of these fibers lighted. These fibers shall be maintained by the proposer. Mn/DOT also requests fiber optic access nodes on freeways at each full or partial interchange outstate, and at one-half mile intervals on freeways within the Twin Cities metro area.

Mn/DOT is willing to consider making as much of its trunk highway right of way available to the proposer as possible for statewide fiber optic installation and maintenance needs outlined in Section 1. Proposed service capacity and considerations for other governmental access should be set forth in the proposal. Service to Mn/DOT district offices shown on Attachment A should be to the facility, not just to the city. Mn/DOT would like some of these fibers lighted. These fibers can be either purchased or installed by the proposer.

Mn/DOT's fiber needs described above are difficult to quantify at this time; therefore, proposers are encouraged to suggest enhanced means of addressing Mn/DOT's needs. Since Mn/DOT's anticipated maintenance requirements will vary dramatically in terms of response time and hours/days needed based on the variety of uses, it is premature to prescribe maintenance requirements in this RFP.

Mn/DOT is willing to consider an agreement term for up to 30 years which could be renewed for an additional 20 years by mutual agreement.

3. Guidelines for Wireless Communications

The construction of towers necessary for wireless communications will be considered for all freeways. Only Mn/DOT owned towers can be on trunk highway right of way. Proposer tower needs can be accommodated by a build-transfer-operate (BTO) arrangement with Mn/DOT. This means the private sector builds and transfers ownership of the towers to Mn/DOT and receives a long term lease in return.

Mn/DOT must be assured of motorist's safety before permitting such tower locations. Service locations to towers and service buildings must be from outside Mn/DOT right of way.

February 20, 1996

4. Selection Criteria

Only one bidder will be selected. The evaluation of proposals will be based on the:

- A. Extent of locations and quality of services offered to meet Mn/DOT and State of Minnesota service needs.
 - 1. Number of places/extent of state service area
 - 2. Number of fibers, number of lighted fibers
 - 3. Maintenance framework
- B. Knowledge of and willingness to meet Mn/DOT specifications, state law and practices as well as for those agencies affected (FAA for Tower construction for example).
- C. Qualifications and communications experience of the proposer.

5. Proposals

The specific content of proposals is not described in this RFP due to the range of communication infrastructure types being so broad, and Mn/DOT needs being not well defined. Proposers are encouraged to work with Mn/DOT's Office of Advanced Transportation Systems regarding its developing architecture, and to include in the proposal an ITS concept design envisioned for both the metro and outstate Minnesota. ITS contact is to be made through the person identified in Section 7.

Proposals shall not exceed 30 pages in length (typed, single spaced, 8½ x 11 inches, no more than double columns and a type face no smaller than 12 point). Appendices to proposals are acceptable if bound in a volume separate from the proposal and do not cover information essential to the evaluation criteria. High cost printing and glossy materials are discouraged.

Eight copies of the proposals are required, sealed individually or collectively, each signed in ink by an authorized representative. Proposals are to be delivered to the person identified in Section 7.

February 20, 1996

6. Mn/DOT Rights Reserved

Mn/DOT reserves all rights available to it by law in administering this RFP, including without limitation, the right to:

- Reject any and all proposals at any time.
- Elect not to commence agreement negotiations with any proposer.
- Negotiate with a proposer without being bound by any provision in its proposal.
- Request or retain additional information for any proposals

Under no circumstances shall the state be responsible for costs incurred by proposer in delivering proposals or in negotiating agreements. Any and all information Mn/DOT makes available to the proposers shall be as a convenience to the proposers and without representation or warranty of any kind.

All proposals submitted in response to the RFP are subject to the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13 (1994). Mn/DOT shall not be liable to a proposer for disclosure of all or any portion of a submitted proposal.

In accordance with the provisions of Minnesota Statutes, Section 363.073, for all contracts estimated to be in excess of \$50,000, all responders having more than 20 full-time employees at any time during the previous 12 months must have an affirmative action plan approved by the Commissioner of Human Rights before a proposal may be accepted. A proposal will not be accepted unless it includes one of the following:

- a. A copy of current certificate of compliance;
- b. A notarized letter of affidavit certifying that your firm has not had more than 20 full-time employees at any time during the previous 12 months.

7. Contract Person/Inquiries

Adeel Lari, Director
Office of Alternative Transportation Financing
Minnesota Department of Transportation
MS 445, Room 214
395 John Ireland Blvd.
St. Paul, MN 55155-1899
(612) 282-6148
(612) 296-3019 FAX

February 20, 1996

Inquiries as to ITS and TMC plans and operations referred to in the RFP should also be directed to Adeel Lari. Other persons are not allowed to discuss this RFP with responders before the proposals due deadline.

8. Schedule

Date

Notice in Minnesota State Register	2/19/96
RFP Release Date	2/20/96
Pre-proposal Conference	3/21/96
Proposals Due	4/10/96
Selection of Proposal for Negotiations	5/24/96

The pre-proposal conference will be held on March 21 at 1:30 pm CST, in the Office of Aeronautics, 222 East Plato Boulevard (west of Lafayette Freeway - TH 52) in St. Paul. This conference is an opportunity to raise questions regarding the RFP. Attendance is not mandatory. Prepared written questions are preferred, and will be collected at the beginning of the conference.

STATE OF MINNESOTA
DEPARTMENT OF TRANSPORTATION
TRUNK HIGHWAY SYSTEM

 **FREEWAY**

